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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON IMMIGRATION, BORDER SECURITY, AND CLAIMS  
REGARDING  
IMMIGRATION REMOVAL PROCEDURES IMPLEMENTED IN THE  
AFTERMATH OF THE SEPTEMBER 11<sup>TH</sup> ATTACKS

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Good morning Mr. Chairman, Representative Jackson-Lee, and Members of the Subcommittee. Thank you for the opportunity to testify before you today on the challenge of maintaining the balance between security and essential American freedoms inherent in responding to the threat of terror, in the particular context of post-September 11<sup>th</sup> immigration removal procedures.

For the record, I am a Senior Legal Research Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan research and educational organization. I am also an Adjunct Professor of Law at George Mason University where I teach Criminal Procedure and an advanced seminar on White Collar and Corporate Crime and I serve on the Editorial Board of the Journal of National Security Law and Policy. In addition I am the Chairman of the Department of Homeland Security's Data Privacy and Integrity Advisory Committee, though nothing I say here, whether written or in oral testimony, represents the views of the Committee or that of other Committee members.

I am a graduate of the University of Chicago Law School and a former law clerk to Judge R. Lanier Anderson of the U.S. Court of Appeals for the Eleventh Circuit. For much of the first 13 years of my career I served as a prosecutor in the Department of Justice and elsewhere, prosecuting white-collar offenses. During the two years immediately prior to joining The Heritage Foundation, I was in private practice representing principally white-collar criminal defendants. I have been a Senior Fellow at The Heritage Foundation since April 2002.

I should note that my perspective on the question before you is that of a lawyer and a prosecutor with a law enforcement background, not that of an immigration law practitioner. Thus, I tend to ask broad questions about appropriate procedures against the backdrop of traditional law enforcement rules, rather than looking at them through the lens of immigration concerns. I should hasten to add that much of my testimony today is based upon a series of papers I have written (or co-authored) on various aspects of this topic and testimony I have given before other bodies in Congress, all of which are available at The Heritage Foundation website ([www.heritage.org](http://www.heritage.org)). For any who might have read portions of my earlier work, I apologize for the familiarity that will attend this testimony. Repeating myself does have the virtue of maintaining consistency -- I can only hope that any familiarity with my earlier work on the subject does not breed contempt.

To begin with, I want to commend the subcommittee for its attention to this matter. As you will no doubt realize, as a Heritage scholar my instincts are conservative in nature. I am not, therefore, often invited to be a witness before this body by the Ranking Democratic Member of a subcommittee. That I am today, and that I feel perfectly comfortable doing so is a testament both to the balanced and thoughtful nature of some of the proposals for reform that have been made concerning this area of law and to a growing bipartisan consensus on matters relating to our post-September 11 response to civil liberties and national security questions.

As you may know, I recently participated in a bipartisan working group comprised of former government officials from both Democratic and Republican administrations who developed a consensus set of recommendations for the renewal of the expiring Patriot Act provisions. My experience there and my analysis of the issues before you today, convinces

me that there can, in fact, be a very wide common middle ground both in politics and in the public. We have but to work together to find it.

I have often, in the past, written that the civil liberties/national security question is the most significant and salient one facing America today – more important, if you will forgive me, than questions about Social Security reform or others of that ilk. We have, perhaps, in the past had an unfortunate tendency not to seek the middle ground. But the questions are too important for that instinct and I am pleased, therefore, to be able to appear before you today in that spirit of bipartisan, or perhaps more accurately non-partisan, inquiry.

In that vein, I realize that this hearing is styled as an oversight hearing. But too often the lack of bipartisanship is the product of dwelling on past problems (and trying to assign blame) rather than seeking solutions. And so, in the context of the problems identified for this committee's examination and in the spirit of bipartisanship that seems to have taken hold, I also want to look today at solutions -- and specifically, at some of those proposed by Representative Howard Berman for modification of immigration procedures in H.R. 1502, the Civil Liberties Restoration Act (CLRA). With that introduction, and in that spirit, let me turn now to the issues before you.

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The Federal government has very wide Constitutional authority to deal with matters of immigration. And it also has a Constitutional obligation to insure national security. But, just because the Congress and the President have a constitutional obligation to act forcefully to safeguard Americans against terrorist attacks does not mean that every means by which they might attempt to act is necessarily prudent. Core American principles would seem to require that any institutional government program be implemented with caution, mindful that many of these systems will be with us for a long time to come.<sup>1</sup> More particularly, as we adopt new rules and regulations we should ensure that checks and balances are maintained, so that Executive authority is cabined. We should be skeptical of any system of laws or procedures that is implemented without the panoply of protections against its abuse. As James Madison told the Virginia ratifying convention: "There are more instances of the abridgment of the freedom of the people by gradual and silent encroachments of those in power than by violent and sudden usurpations."<sup>2</sup>

Thus, when reasonable solutions are proposed that will maintain the necessary Executive authority, but limit the potential for abuse they should, in my view, be given careful consideration. I, therefore, want to look at the issues before this subcommittee through the lens of four such proposals in the CLRA.

**Section 101** – Section 101 of the CLRA is intended to address issues arising from the implementation of the Creppy Memorandum in the immediate aftermath of September 11.

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<sup>1</sup> *See generally* Paul Rosenzweig, Principles for Safeguarding Civil Liberties in an Age of Terrorism, Executive Memorandum No. 854 (The Heritage Foundation, Jan. 2003).

<sup>2</sup> Speech to the Virginia Ratifying Convention, June 16, 1788, *reprinted in* Matthew Spalding, ed., *THE FOUNDERS' ALMANAC* 133 (The Heritage Foundation, 2002).

As the subcommittee is well aware, that memorandum authorized the blanket closure of immigration proceedings. Section 101 (as introduced in HR 1502) would prohibit that sort of blanket closure, and establish a presumption that immigration hearings should be open, except in cases of national security, to protect the identity of a confidential informant or to protect identity of the immigrant whose hearing is being conducted.

Reasonable minds can disagree over the government's constitutional authority to issue such a blanket order of closure. Indeed, the Third and Sixth Circuits have done so in their review of the policy.<sup>3</sup> We need not, however, resolve that constitutional question – for it seems to me that, as a matter of policy to be set by this body, we should strongly prefer openness and transparency of governmental functions where possible.

Put another way, most Americans recognize the need for enhanced national security. They are even willing to accept certain governmental limitations on open proceedings as a necessary response to the new threats.

But what they insist upon – and rightly so – is the development of systemic checks and balances to ensure that new authorities and powers given the government are not abused. And to achieve a suitable system of oversight against abuse, we need adequate transparency. We do not seek transparency of government functions for its own sake. Without need, transparency is little more than voyeurism. Rather, its ground is oversight – it enables us to limit the executive exercise of authority. Paradoxically, however, it also allows us to empower the executive; if we enhance transparency appropriately, we can also comfortably expand governmental authority, confident that our review of the use of that authority can prevent abuse. While accommodating the necessity of granting greater authority to the Executive branch, we must also demand that the Executive accept greater review of its activities.

In that spirit, a presumption of open proceedings enhances rather than diminishes our program of immigration law enforcement. It allows us to understand the implementation of the law; provides the opportunity for observation by the public; and, most significantly, provides an ability to measure the program's implementation against some objective outside metric. Public notice of governmental activity is the hallmark of accountability – it fixes in time and place the ground for decision making and prevents *ex post* justifications from being developed.

Thus, we should be at least somewhat concerned by any blanket closure order. It undermines the transparency of government processes and public confidence in the justice of our system. It also frustrates, to some degree, Congress' oversight responsibilities. For as John Stuart Mill said: “[T]he proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel full exposition and justification of all of them which anyone considers questionable; to censor them if found condemnable.”<sup>4</sup>

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<sup>3</sup> Compare *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) (holding blanket closure policy constitutional) with *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002) (holding policy unconstitutional).

<sup>4</sup> John Stuart Mill, “Considerations on Representative Government,” 42 (1875)

Thus, the premise of Section 101 – that the routine closure of immigration proceedings is unwise – is one that all should endorse. I would express one reservation regarding the draft of the language as originally introduced (I understand that some consideration is being given to modifying the language). As drafted, the bill particularizes only three specific grounds on which an immigration hearing might be closed – national security; protection of a confidential informant; and to preserve the confidentiality of an asylum application.

I can at least imagine several other plausible, perfectly legitimate, compelling governmental interests that would, on a case-by-case basis be reasonable to advance as grounds for a hearing closure. Examples of such, by way of analogy, might include factors akin to those used for delaying notification of electronic surveillance – that is, if keeping a hearing open might endanger the life or physical safety of an individual, or allow flight from prosecution, the destruction of evidence, or the intimidation of witnesses.<sup>5</sup> My recommendation is that the language be amended to capture the possibility of such other contingencies, either by specifying them individually or, perhaps more readily, by simply authorizing case-by-case closure of the hearings on a showing of a compelling governmental need and then expounding on that authorization by way of example in the committee's report language.

With that one caveat – that some broadening of closure grounds is required – section 101 strikes, in my judgment, the right balance. It adopts as a rule our general preference for transparency, but recognizes that in the post-September 11 world there might, in individual cases, be a necessity for modifying that preference.

**Section 201** -- Section 201 would requires DHS to serve a Notice to Appear (NTA) – the charging document that begins an immigration proceeding – on every non-citizen within 48 hours of his arrest or detention. It also requires that any non-citizen held for more than 48 hours be brought before an immigration judge within 72 hours of the arrest or detention. This section recognizes an exemption for non-citizens who are certified by the Attorney General, based on reasonable grounds, to have engaged in espionage or a terrorist offense, as provided for in the Patriot Act.

Prior to September 11, 2001, the INS was required to make charging determinations within 24 hours of arrest. On September 20, 2001, the Justice Department issued an interim rule extending that charging period to 48 hours or “an additional reasonable period of time” in “emergency or other extraordinary circumstances.”

The genesis of this legislative proposal lies in the immediate aftermath of September 11. As the Department of Justice's Inspector General has reported, many non-citizens were jailed without being informed of the grounds for their detention for lengthy periods – a few (roughly 3%) for more than a month after being arrested. These delays in serving notice of charges made it difficult for immigrants to understand the basis for their detention, request bond, or be effectively represented by legal counsel.<sup>6</sup> Indeed, it is notable that while regulations require that a charging decision must be made within a specified period of time,

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<sup>5</sup> I draw these ideas from 18 USC § 2705(a)(2). To be sure the analogy is not perfect.

<sup>6</sup> See generally DOJ OIG, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (April 2003).

no rule requires service of the charges (in the form of an NTA) on the non-citizen in a timely fashion – only INS (now ICE) practice embodies that requirement.

To be sure, a portion of the delay found by the Inspector General is explicable by the truly extraordinary circumstances that existed in New York after September 11. The INS field office where many of the records were kept, for example, was within the closure zone in southern Manhattan.

But even those extraordinary circumstances cannot explain the absence of a legal standard. Notice of charges is a fundamental core aspect of what we consider reasonable due process. Indeed, the requirement for notice of criminal charges goes back to the 1500s as a response to the Star Chamber of England.

Thus, in 1637 when Freeborn John Lilburne, a Puritan, was examined by the Star Chamber on unspecified charges, his response was simple: “I am not willing to answer you to any more of these questions, because I see you go about by this examination to ensnare me; for, seeing the things for which I am imprisoned cannot be proved against me, you will get other matter out of my examination; and therefore, if you will not ask me about the thing laid to my charge, I shall answer no more.”<sup>7</sup>

The American legal tradition, born of the English common law and informed by the history of religious prosecution that motivated many Englishmen to emigrate, reflects an early and consistent adoption of this common law preference for accusatorial specificity. The requirement is so ingrained that as Justice Black has written: “No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.”<sup>8</sup>

Of course, immigration proceedings differ from criminal charges. And thus, again, reasonable minds can differ on whether a particular type of notice requirement is constitutionally mandated. But, again, it seems to me that we should all agree that it is good policy. Especially if understood, as I understand it, to contain an exception for truly extraordinary circumstances (should, for example, a repeat of September 11 make it impossible for compliance) it is difficult to see the argument against a general rule requiring service of the notice on the non-citizen once the charging decision has been made.

As drafted section 201 has one other benefit. It excludes from consideration those immigrants deemed by the Attorney General to pose national security risks pursuant to the Patriot Act (as it should – for as to those immigrants one can imagine circumstances where notice might adversely effect national security interests). As a consequence, section 201 may well have the collateral benefit of providing an incentive for the Department to use the provisions of the Patriot Act in which Congress authorized such determinations – a set of rules that have gone unused in part because of the ready availability of alternate administrative mechanisms. Where Congress has expressly spoken to an issue it seems to me preferable that the Executive abide that determination, rather than relying on more

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<sup>7</sup> 3 State Tr. 1315, 1318 (1637) (emphasis added). This description of the examination is based upon Lilburne's own written account.

<sup>8</sup> *Cole v. Arkansas*, 333 U.S. 196 (1948).

general authority. If section 201 assists in that, it will have additional benefits beyond its express provisions.

**Section 202 --** Section 202 would require the Secretary of Homeland Security to provide all detainees, except those in categories specifically designated by Congress as posing a special threat, with an individualized assessment as to whether the non-citizen poses a flight risk or a threat to public safety. If the individual is determined to not be a flight risk or danger, the Secretary of Homeland Security must set a reasonable bond or other conditions that will ensure the person's appearance in future proceedings.

This decision is in response to recent policies adopted by the Department of Justice that have, in effect, denied bond to whole classes of non-citizens with no individualized hearings before a judge. For example, the Attorney General issued a precedent Board of Immigration Appeals decision declaring that all Haitian asylum applicants who arrive by sea must be held in detention while their asylum proceedings are pending.<sup>9</sup>

Unilateral executive branch decisions mandating detention for classes of individuals is inconsistent with our commitment to individuated justice. When we make broad decision regarding classes of people in situations that call for individual consideration the rule of law is, again diminished. Indeed, the blanket detention of individuals who pose no risk of flight or harm to the community wastes critical resources that should be concentrated on investigating and detaining actual risks.

To be sure, requiring individual hearings is, itself, a significant cost on the system – but it is one that the system ought to bear as a mark of our commitment to due process. Nor, in my view, is the requirement for an individual hearing a code for excluding from consideration all factors that are not unique to the individual. Calling for an individualized determination does not, it seems to me, necessitate closing our eyes to factors beyond the individual's situation. There may, indeed, be general considerations regarding a category of immigrants that are relevant to a group of individuals. But in the end, those general considerations cannot legitimately be the *only* factors considered. Rather, as a matter of policy and as a matter of simple justice, those general considerations can and should properly be a piece of the puzzle, matched up with individual considerations unique to each individual. To be sure, we may approach some claims with a general skepticism, but equally surely we should provide for the rejection of that general skepticism when the facts and circumstances warrant.

Here is one example of how this construct would, in my mind, properly work. Consider the case of illegal immigrants who have already been designated for deportation by an immigration judge and who now have an appeal pending before the BIA. The DHS' "Hartford pilot project" -- a policy that mandates detention on every non-citizen who loses before the immigration judge – seems to me the wrong answer. It substitutes a single general consideration for individual consideration.

But we need not go so far as to disregard the fact that an initial determination of deportability has been made. It is not surprising that people facing a potentially final order

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<sup>9</sup> *In re D-J*, 23 I&N Dec. 572 (A.G. 2003).

of removal are more likely to abscond than those as to whom no initial adjudication has been made.<sup>10</sup> And we would be foolish to utterly ignore that reality.

Thus it seems, again, to me that an analogy to criminal law is apt. Prior to a criminal trial, the presumption is in favor of release. Once a defendant has been convicted however, the presumption reverses and we anticipate the denial of bail unless the defendant makes a convincing case that he is not a flight risk or a danger to the community.<sup>11</sup> To be sure, he continues to be entitled to an individual determination. But this paradigm does reflect the appropriate balance (as, I believe, does section 202). It requires individual consideration of factors both relevant to the individual and of general applicability. Our own commitment to individual justice suggests nothing less.

**Section 203** – Finally, Section 203 permits the Board of Immigration Appeals to stay the immigration judge’s decision to release the alien for a limited time period and when the government is likely to prevail in appealing that decision and there is a risk of irreparable harm in the absence of a stay. This provision reverses an existing rule that enables the government to unilaterally nullify a judge’s order to release an individual on bond after finding that he is neither a flight risk nor a danger to the community. The rule permits the Department to automatically stay an immigration judge’s decision to release an alien if the government originally denied bond or set it at \$10,000 or more. The rule has the effect of allowing the government’s immigration attorneys to overrule immigration judges.

On simple checks and balances principles, the existing rule seems inappropriate (though, again, it may very well be constitutionally permissible). As I’ve made clear throughout this testimony, I believe we can grant the government additional powers to combat terrorism while reasonably anticipating that the checking mechanisms in place will restrain too excessive a use of those powers. We must, and should, therefore be highly skeptical of rules and regulations that eliminate or limit those checking mechanisms.

The ability of an executive official to stay the order of an immigration judge on his own authority is an example of the type of rule that rightly generates skepticism. As a former government attorney myself, I yield to nobody in my admiration for their commitment to the rule of law. When they err, in my view, it is more often from mistake than from venality. But it is precisely because they are fallible human beings that we provide for oversight of their actions – and a unilateral ability to disregard the order of an immigration judge violates that principle of oversight.

To be sure, immigration judges err as well – and that is why we have the Board of Immigration Appeals. But, in my view, section 203 is right to place review of the immigration judge’s bail decision in the BIA, rather than with a Departmental trial attorney.

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<sup>10</sup> See Immigration and Customs Enforcement, Endgame: Office of Detention and Removal Strategic Plan, 2003-2012 (2003) (reporting 85% absconder rate for those released after final order of removal). The DOJ IG has reported a 30% absconder rate for those released during proceedings and a 70% rate for those with a final order of removal.

<sup>11</sup> Compare 18 U.S.C. § 3142 (presuming release appropriate pending trial) with 18 U.S.C. § 3143 (presuming detention appropriate post-trial, pending appeal).

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I conclude where I began, by commending the subcommittee for its attention to these matters. The time to address these issues is now. As Michael Chertoff, the former Assistant Attorney General for the Criminal Division and now Secretary for Homeland Security, wrote during a brief stint in the private world:

The balance [between liberty and the response to terror] was struck in the first flush of emergency. If history shows anything, however, it shows that we must be prepared to review and if necessary recalibrate that balance. We should get about doing so, in light of the experience of our forbearers and the experience of our own time.<sup>12</sup>

In reviewing what we have done and what we should do in the future, we must be guided by the realization that this is not a zero-sum game. We can achieve both goals – liberty and security -- to an appreciable degree. The key is empowering government, while exercising oversight. So long as we keep a vigilant eye on police authority, so long as the courts remain open, and so long as the debate about governmental conduct is a vibrant part of the American dialogue, the risk of excessive encroachment on our fundamental principles of liberties and due process is remote. The only real danger lies in leaving policies unexamined.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee. I look forward to answering any questions you might have.

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<sup>12</sup>See Michael Chertoff, *Law, Loyalty, and Terror*, THE WKLY. STANDARD 15, 17 (Dec. 1, 2003).